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IN THE

Supreme Court of the United States

October Term, 1961.

No. 282.

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE, LTD.,
Respondents.

REPLY BRIEF FOR RESPONDENTS.

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REPLY BRIEF FOR RESPONDENTS.

At the oral argument on February 20, 1962, the Court granted the respondents leave to file a brief in reply to a procedural question which petitioner raised for the first time in a reply brief served upon respondents' counsel on Friday, February 16, 1962, three days prior to the time the case was listed for argument and four days before it was called for argument.

For the first time the petitioner raised the procedural point of whether what had been filed in the district court constituted compliance with Federal Rule of Civil Procedure 50(b). Upon the point turns the question of whether the respondents are entitled only to a new trial or whether the court of appeals was correct when it said that the judgment in favor of Atlantic and Gulf Stevedores, Inc.

> "will be reversed, and the cause remanded with directions to the district court to proceed in accordance with this opinion." [R230, concluding words of the opinion of the court of appeals.]

Respondents first call attention to the fact that the court of appeals did not enter judgment but remanded the case to the district court with directions. In no case cited or relied upon by the petitioner did the judgment of the court of appeals remand the case with directions. The court of appeals did not enter judgment. It is to be noted as well that one of the cases upon which the petitioner chiefly relies is *Budge Manufacturing Co. v. U. S.*, [C. A. 3, 1960] 280 F. 2d 414. We call attention to the fact that a three-judge panel of the court of appeals decided the *Budge* case and that two of the same three judges decided the case at bar. We respectfully suggest it is not to be presumed that two of the same three judges who heard and decided the case at bar in the court of appeals would be unmindful of the point which petitioner now raises for the first time, if in fact it was the identical point.

At oral argument we called attention to the fact that this point was not raised by petitioner until the filing of

its reply brief in this Court four days before the case was called for argument. The point had not been raised by the petitioner in the court of appeals; in its petition for rehearing in the court of appeals; in its petition for certiorari; or in its main brief for this Court. As we conceded at oral argument, a separate paper denominated "A Motion under Rule 50(b)" was not filed by respondents, and if such a separate paper is required then respondents concede the validity of the petitioner's point.

As will more fully appear by reference to excerpts from the record in the district court [not incorporated into the appendix in the court of appeals or the record before this Court for the simple reason that they were heretofore unnecessary to the points raised], counsel made a statement at the close of the evidence and addressed it to the trial court. In the original record it appears on page 1113. The last evidence from the last witness appears at page 1112 of the record.

Respondents' counsel said:

"Judge Ganey, I made a motion at the end of the plaintiff's case, and I have handed in a written motion for binding instructions. I renew the request, but I am also twenty-one-plus; I know that with the attitude of the Court of Appeals I am wasting my breath.

THE COURT: That is quite all right. Let the record show it is denied.

MR. MARSHALL: So the record will be clear, the motion I referred to a while ago was my motion for directed verdict. It was inadvertently attached to my original motion under 41(b).

THE COURT: Yes, that is all right. That is on the record and it is so denied.

MR. BOROWSKY: While we are talking about the record, may I also add that I have requested a directed verdict on the ground of unseaworthiness?

THE COURT: Yes; that is right. Motion denied. What do you want to do? Do you want to take them up? I would like to hear all of you. Shall we wait till after luncheon? What do you want to do?

MR. BYRNE: Take up the requests for charge, Judge Ganey.

THE COURT: Points for charge? I would like you to get together. I don't mean points for charge—I mean interrogatories to the jury. They are pointed toward, it seems to me, and look toward each particular——"

Respondents' written requests for charge so far as they are here material read as follows:

"3. If you should return a verdict in favor of the plaintiff and against the defendants, or either of them, then under all the evidence you must return a verdict in favor of the defendants and against the third party defendant, Atlantic & Gulf Stevedores, Inc.

* * *

7. If, on the other hand, you find in favor of the plaintiff and against the defendant, and the basis of your finding is that the method of discharging was not reasonably safe and proper under the circumstances existing at the time of the accident, then I charge you that under these circumstances you must further find a verdict in favor of the defendant and against Atlantic & Gulf Stevedores, Inc."

When the third circuit decided *Budge, etc., supra,* it said:

"It is difficult for us to perceive how this requested charge[1] made *before any evidence had been*

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[1] "Under the law and the evidence in this case your verdict must be for the plaintiff".

> *tendered* in the case, not renewed at the conclusion of the government's case, and whose specific denial by the court was acceded to or at least not objected to by the taxpayer, can be construed as fulfilling the requirement of Rule 50(a)."

Here there was no written request for charge filed before any evidence had been tendered nor was it a request "thrown in along with a considerable list of points".

Counsel for respondents filed its brief on post-trial motions in which it stated, inter alia, "Ellerman made a motion to dismiss at the close of the plaintiff's evidence and submitted its points for binding instructions. It thus reserved its right, pursuant to Rule 50(b)".

Ellerman then proceeded to argue its post-trial motions and one of the points it made was

> ". . . that, as a matter of law, the defendant [respondent] is entitled to judgment for indemnity against Atlantic [petitioner]."

Basing their subsequent argument upon decisions of this Court, chiefly *Crumady v. The Joachim H. Fisser*, 358 U. S. 423, the respondents then argued this question to the district judge. Petitioner likewise argued this same question to the district judge and never suggested that there had been any procedural lapse or that the question was not open for decision because of any deficiency in preserving respondents' right to argue because respondents had not complied with Rule 50(b).

The same is true of the case as it proceeded through the court of appeals and upon petition for certiorari before this Court.

It is submitted that the oral motion by respondents' counsel quoted above combined with the written request that the jury must "find the verdict in favor of the defendant and against Atlantic and Gulf Stevedores, Inc." [R157a] constituted compliance with Rule 50 and that the filing by the respondents on May 7, 1958 [R3a] of "de-

fendants' motion for judgment notwithstanding the verdict, etc." was compliance with Rule 50(b). Neither petitioner nor the court below was in any doubt about reasons or the specific grounds of respondents' motion, for at page 1140 of the original record [not reproduced for the reasons heretofore stated] respondents' counsel said:

> "If the defendant is liable on that basis I think that is the clearest kind of case for an award of indemnity over."

It is respectfully suggested that if petitioner is serious in the arguments it has made in its reply brief, it has misread this Court's decision in *Johnson v. New York N. H. & H. R. Co.*, 344 U. S. 48. There the defendant did not file a post-trial motion for judgment notwithstanding the verdict although, "when the evidence was all in, the railroad moved to dismiss the complaint and also asked for a directed verdict in its favor, etc." After reception of the verdict, the railroad defendant in that case

A. moved to have the verdict set aside as excessive;

B. moved to have the verdict set aside as contrary to the law;

C. moved to have the verdict set aside as contrary to the evidence;

D. moved to have the verdict set aside as contrary to the weight of the evidence.

It is to be specifically noted that the post-trial motions of defendant there did not exclude a prayer for the entry of judgment n.o.v.

We respectfully urge that the petitioner relies upon pure semantics.

We emphasize that we are not relying upon any state practice or any state statute with respect to the entry of judgment notwithstanding the verdict. Cf. 344 U. S. at 52, footnote 2. What we are urging is that the use of colloquial

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and
THE CITY LINE, LTD.,
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PETITION FOR REHEARING.

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phraseology asking for the entry of judgment notwithstanding the verdict should not be a bar to the entry of such judgment because certain magic words had not been used, again probably because they are not in accordance with the colloquial phraseology with which the Court and all counsel involved are abundantly familiar.

Here the district court did have presented to it the questions of whether it would enter judgment notwithstanding the verdict or would grant a new trial. The fact that it rejected both does not detract from the opportunity presented to it to "exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by the witnesses". *Cone v. West Virginia Pulp and Paper Co.*, 330 U. S. 212 at 216.

The district court had the opportunity to determine

> "whether a new trial should be granted or a judgment entered under Rule 50(b) . . ." *Cone, supra.*

The district court had the opportunity

> "after all his rulings had been made and all the evidence had been evaluated to view the proceedings in a prospective peculiarly available to him alone." *Cone, supra.*

It is respectfully submitted that the motions, requests for charge and post-trial motions in the case at bar fully preserved the rights of the respondents without the filing of a separate sheet of paper called a motion under Rule 50. It is respectfully submitted that the court of appeals was fully cognizant of the prior decisions of this Court and its own prior decisions [*Budge v. U. S., supra*] when it reversed and remanded this case with directions to the district court to proceed in accordance with its opinion [R230].

The respondents suggest that the matter raised for the first time in petitioner's reply brief filed just before oral

argument is not only without merit but that the point raised is merely an effort to distract the attention of the Court from the main issues in the case and the lack of merit of petitioner's attack upon the decision of the court of appeals as to the real issues between petitioner and respondents.

Respectfully submitted,

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